

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

**SHARPER IMPRESSIONS PAINTING
CO.,**

Plaintiff,

vs.

MICHAEL THIEDE, et al,

Defendant,

Case No. 2:21-CV-02245

Judge Algenon L. Marbley

Magistrate Judge Chelsey M.
Vascura

**DEFENDANT MICHAEL THIEDE'S MOTION FOR LEAVE OF COURT TO
FILE DEFENDANT MICHAEL THIEDE'S SECOND RESPONSE TO
PLAINTIFF'S MOTION TO ENFORCE AGREED PERMANENT
INJUNCTION AND FINAL JUDGMENT ENTRY AND CONTEMPT OF
COURT AND REQUEST FOR SANCTIONS**

COMES NOW Defendant Michael Thiede, (hereinafter, "Mr. Thiede"), by and through counsel, and files this Motion for Leave of Court Pursuant to Local rule 7.2(a)2 to file Defendant Michael Thiede's Second Response to Plaintiff's Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry and Contempt of Court and Request for Sanctions showing to the Court the following:

Mr. Thiede brings this motion to further respond to Plaintiffs Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry and Contempt of Court and Request for Sanctions and Plaintiff's Reply to Defendant's Response to Motion.

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Defendant's Motion is supported by the attached Memorandum in Support and Exhibits thereto.

This 26th day of July, 2022

/s/Ronald F. Debranski II
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff's response, has added claims for sanctions and requests for relief. Defendant, Michael Thiede, (hereinafter, "Mr. Thiede") requests that this Court allow Mr. Thiede to further respond per Exhibit "M-1".

Plaintiff filed its Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry And Contempt of Court and Request for Sanctions on June 21, 2022. (Doc. 37).

Mr. Thiede, through counsel, filed his response on July 7, 2022. (Doc. 43.). Plaintiff then filed Plaintiff's Reply to Defendant's Response to Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry And Contempt of Court and Request for Sanctions on July 15, 2022 which adds claims and requests for relief. (Doc. 45.).

II. ARGUMENT AND CITATION OF AUTHORITY

Local Rule 7.2(a)(2) states as follows: Opposing and Reply Memoranda. Any memorandum in opposition shall be filed within twenty-one days after the date of service of the motion. Failure to file a memorandum in opposition may result in the granting of any motion that would not result directly in entry of final judgment or

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an award of attorneys' fees. Any reply memorandum shall be filed within fourteen days after the date of service of the memorandum in opposition. No additional memoranda beyond those enumerated are permitted except upon leave of court for good cause shown.

Thus, upon leave of court and for good cause show, Mr. Thiede requests that this Court allow the attached Defendant Michael Thiede's Second Response to Plaintiff's Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry and Contempt of Court and Request for Sanctions.

This 26th day of July, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT MICHAEL THIEDE'S MOTION FOR LEAVE OF COURT TO FILE RESPONSE TO PLAINTIFF'S MOTION TO ENFORCE AGREED PERMANENT INJUNCTION AND FINAL JUDGMENT ENTRY AND CONTEMPT OF COURT AND REQUEST FOR SANCTIONS was served through the court's ECF System on all ECF participants registered in this case at the email addresses registered with the court, by the Court's ECF System on July 26, 2022

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EXHIBIT

M-1

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COURT AND REQUEST FOR SANCTIONS**

COMES NOW Defendant Michael Thiede, by and through counsel, and files this Response to Plaintiff's Reply to Defendant's Response to Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry and Contempt of Court and Request for Sanctions (Doc. No. 45) showing to the Court the following.

Defendants Response is supported by the attached Memorandum in Support and Exhibits thereto.

This 26th day of July, 2022

/s/Ronald F. Debranski II

Ronald F. Debranski II

Attorney for Michael Thiede

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Defendant, Michael Thiede, (hereinafter, "Mr. Thiede") again reiterates that the instant action terminated on January 25, 2022. Plaintiff then committed new misappropriation of Mr. Thiede's likeness in an effort to trade on Mr. Thiede's reputation in the marked in March and April of 2022. As previously stated, Plaintiff Sharper Impressions Painting Co. and its apparent subsidiary, Sharper Impressions Painting of Atlanta, LLC mailed multiple flyers continuing to trade on Mr. Thiede's image and likeness in Georgia. (See Doc. 43 Exhibits "B", "C", "D", and "E" and "F").

II. ARGUMENT AND CITATION OF AUTHORITY

While Mr. Thiede might agree that the Settlement Agreement and Mutual Release resolve all issues prior to the termination of this action, they do not serve to absolve Plaintiff of liability from future torts it commits. Here, it is clear that after concluding this matter in January of 2022, Plaintiff used Mr. Thiede's image without Mr. Thiede's permission in advertisements sent to thousands of households in Georgia.

The law in Ohio regarding res judicata involves both claim preclusion

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(historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel). Grava v. Parkman Twp., 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). “A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” Also see Whitehead v. Gen. Tel. Co. (1969), 20 Ohio St.2d 108, 49 O.O.2d 435, 254 N.E.2d 10; Krahn v. Kinney (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, 1062; 46 American Jurisprudence 2d (1994) 780, Judgments, Section 516. (This case involves claim preclusion only.) However, after this case ended, Plaintiff blatantly chose to commit further intentional actions to harm Mr. Thiede.

As discussed in Roth v. Glueck, 2012-Ohio-4407, September 28, 2012, the claims in this lawsuit could not have been brought as claims in the first lawsuit because the conduct at issue had not even occurred before the Order was entered. They did not arise out of the same transaction or occurrence as the claims brought in the first lawsuit because they did not have a common nucleus of operative facts.

As here, Glueck in Roth argued that the claims in the second lawsuit were either barred under the doctrine of res judicata or prohibited by a settlement agreement entered into by the parties. However, also as here, the conduct that gave

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rise to the second action were never the subject of a valid, final judgment on the merits and, therefore, they are not barred under the doctrine of res judicata.

Plaintiff's actions giving rise to the Georgia action had not occurred when the instant case was resolved. These are new claims based on Plaintiff's subsequent tortious actions and do not "arise out of the same transaction or occurrence" that was the subject matter of the instant action.

In applying the doctrine of res judicata, the Ohio Supreme Court has clarified that the phrase "arising out of the same transaction or occurrence that was the subject matter of the previous action" means that the claims have a "common nucleus of operative facts." Grava, 73 Ohio St.3d at 382-383, 653 N.E.2d 226. A "common nucleus of operative facts" does not exist where there has been a change in circumstances. See State v. Schwartz, 1st Dist. No. C-040390, 2005-Ohio-3171, ¶ 9, citing Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals, 31 Ohio St.3d 260, 510 N.E.2d 373 (1987); see also Grava at 383.

In Roth, the Court ruled that the claims in the second lawsuit could not have been brought as claims in the first lawsuit because the conduct at issue had not even occurred before the Agreed Order was entered. The claims brought in the second lawsuit did not arise out of the same transaction or occurrence as the claims brought in the first lawsuit because they did not have a common nucleus of operative facts.

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Further, as in Roth, there is nothing in the Settlement Agreement that contemplates Plaintiff committing future torts against Mr. Thiede or shields Plaintiff from liability based on those actions.

Again, as previously quoted in Roth v. Glueck, 2012-Ohio-4407, September 28, 2012, the claims in this lawsuit could not have been brought as claims in the first lawsuit because the conduct at issue had not even occurred before the Order was entered. They did not arise out of the same transaction or occurrence as the claims brought in the first lawsuit because they did not have a common nucleus of operative facts.

Thus, Mr. Thiede's claims are valid in the United States District Court for the Northern District of Georgia, Civil Action File No. 1:22-CV-01838 and there is no basis in law or fact for Plaintiff's Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry and Contempt of Court and Request for Sanctions.

B. Thiede Filed A New Lawsuit in Georgia Based on Plaintiff's New Independent Actions.

Mr. Thiede agrees that there is a Governing Law provision of the Agreed Permanent Injunction and Final Judgment Entry. Mr. Thiede also agrees that Paragraph 10 states "[a]ll other claims asserted in this action are hereby dismissed with prejudice. As this judgment resolves all claims this is a final judgment."

However, it is clear that the claims in the Georgia action arise from Plaintiff's

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intentional actions subsequent to this action being finalized. Thus, those actions could not have been contemplated and cannot be governed by the Agreed Permanent Injunction and Final Judgment. Thus, Plaintiff's reliance on Kokkonen v. Guardian Life Ins. Cop. Of America, 511 U.S. 375 (1974) and RE/MAX Int'l, Inc. V. Realty One, Inc., 271 F.3d 633, 643 (6th Cir. 2001) are inapplicable to facts in this case.

Wherefore, Defendant Michael Thiede humbly requests that this honorable Court Deny Plaintiff's Motion to Enforce Agreed Permanent Injunction and Final Judgment Entry and Contempt of Court and Request for Sanctions in its entirety.

This 26th day of July, 2022

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